IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2153 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ANAK @ MASTER MURUBHAI VARA (KATHI)

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 23/04/98

ORAL JUDGEMENT

By this application under Art.226 of the Constitution of India, the petitioner calls in question the legality and validity of the detention order dt. 19th September, 1997 passed by the Police Commissioner for the city of Ahmedabad invoking his powers under Sec. 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short the "Act"), pursuant to which he is arrested and at present, kept under detention.

2. Necessary, facts in order to appreciate the rival contentions, may in brief be stated. The Police Commissioner, in the discharge of his duties, came to know that the petitioner was the dangerous person. He was carrying out his several criminal activities which could be termed as anti-social activities, disturbing the public order. He, therefore, perused the record available on different Police Stations. He could know that with Bapunagar Police Station, a complaint of the offences punishable under Secs. 307, 395, 397, 398, 120(B), 411, 414 read with Sec. 114 of I.P.Code and Sec.25(1)(b) of the Indian Arms Act and Sec. 135 of the Bombay Police Act, was filed alleging that with the active assistance of his compeers, he attacked on the complaint who was passing in his jeep, caused damaged to the jeep showering hockey blows and then caused grievous hurt showering sword blows, & hockey blows and putting the complaint in fear of instant death or grievous hurt, took away diamonds to the tune of Rs.11,69,800/-. Another complaint with Naroda Police Station was also found to have been lodged, wherein it is alleged that the petitioner kidnapped Sunil Jayantilal the paramour of complainant and beat him after wrongfully confining him. Against the petitioner, a third complaint was found to have been lodged with Saradarnagar Police Station. As alleged in that complaint, the petitioner had kept a revolver with him without any licence. Using the sword and pointing lethal weapons, the petitioner and his compeers, robbed Arvindkumar Kantilal Patel serving in the courier's firm, by snatching away Rs.5,25,000/- from him. The fourth complaint for such offence of robbery was also lodged against the petitioner in Mahidharpura Police Station at Surat. Likewise another complaint came to be lodged with Katargam Police Station of the City of Surat. As alleged, the petitioner committed the offence of robbery, taking away diamonds to the tune of Rs.32 Lacs, putting the concerned persons in the fear of instant death or grievous hurt. Studying the papers, the Police Commissioner was shocked to know that the petitioner was a head-strong person i.e. a tartar and decimator. He was often committing the offence of robbery, decoity and kidnapping, putting the persons in the fear of instant death or grievous hurt. The petitioner was wielding the scepre and by force, used to satisfy his unjust and illegal demands and those who refused to bend his way, were brutally beaten or made to face with dire consequences. With the result, the people were not feeling secured, and no one was willing to lodge the complaint or come forward to make the statement against the petitioner. To curb his anti-social

activities, shattering and battering the public life, stern action against the petitioner was necessary. It was found after cogitation that any action if taken under the general law, sounding dull would yield no result. The Police Commissioner, therefore, found that the only way out was to pass the impugned order and detain the petitioner. In the result, the impugned order came to be passed and the petitioner at present is kept under detention. By this application, therefore, the petitioner calls in question the legality and validity of the order in question.

3. The order of detention is challenged on several grounds. On query, the learned advocate for the petitioner realised that the submission that the petitioner cannot be branded as dangerous person would not find favour, she tapered off of her submission confining to the only ground namely exercise of privilege under Sec.9(2) of the Act. According to the petitioner's learned advocate, there was no just cause for the Police Commissioner to suppress the particulars about the witnesses. For want of necessary particulars, i.e. source of the statements, effective representation could not be made. Had the particulars being supplied, the petitioner could have pointed out how the statements recorded were not reliable. In short, when his right to make effective representation thereby was impaired, the continued detention was bad in law. It is also the submission on behalf of the petitioner that the Police Commissioner exercised the privilege for non-disclosure of the particulars without applying his mind. He assigned the task to inquire to his subordinate officer, for knowing whether the fear expressed by the witnesses was genuine & honest or imaginary & empty excuse. Whatever that officer reported has been mechanically accepted, and therefore, the subjective satisfaction of the detaining authority is vitiated, and the continued detention may be held to be unconstitutional and illegal.

4. In reply to his such contention, Mr. Kamal Mehta, the learned AGP submitted that all the necessary papers and the documents made available to the detaining authority were considered, the copies of which are also provided to the petitioner. After careful perusal, it was found necessary to protect the lives of the witnesses, because retaliatory tendency of the petitioner could not be overlooked. When thus in public interest, the particulars about witnesses were required to be kept secret, it cannot be said that the privilege is exercised without any just cause and there is non-application of mind, and subjective satisfaction is vitiated.

5. When both have confined to the only point namely the exercise of privilege, it would be better if the law about non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating nondisclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated

as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority was required to file the affidavit and satisfy the court that it was in the public interest namely to protect the lives of the witnesses certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case affidavit justifying the circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what defence he could take, what were the reasons to state against him and whether in fact those witnesses really stated so or whether they were really in existence ? Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is therefore liable to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention dated 19th September, 1997 passed by the Police Commissioner for the City of Ahmedabad is quashed and set aside being unconstitutional and illegal and the petitioner is ordered to be set at liberty forthwith if no longer required in any other

case. Rule accordingly made absolute. D.S. permitted.

23-4-1998.
(ccs)